MICHIGAN SUPREME COURT

October 21, 1999 Public Hearing

CHIEF JUSTICE WEAVER: Well, how nice to see all of you. And on behalf of my colleagues, we tell you that we're very delighted to be here in beautiful Berrien County. And we couldn't have had a more gorgeous night to arrive. Your colors are in certainly the most beautiful bloom. The views of the lake are absolutely breathtaking. And that's from someone who's from Leelenau county, who considers that Berrien County is leading –

With that, we're very happy to be able to have our administrative hearing as we are on the road. And as you may or may not know, the court is holding administrative hearings around the state. We usually have them in Lansing. Las month we had one in Grand Rapids. This month we're here in St. Joe, Berrien County. We will be going before too long to Gaylord. We will go to Marquette, we will go the Flint, we will go to Detroit during the course of the year.

Because we do want to hear from the people that we serve. Because our courts are here to serve the public and to see that not only do we continue to have the ferris and the justice services, but also the most efficient and effective and timely services unbiased and unprejudiced that we can have for the public.

With all that in mind, we do have an agenda and we will take our agenda items first and then I am very aware that we have people who have come to share matters with us. And we will then take up the matters in that order.

As you know, anyone who speaks will have three minutes without questioning to talk to us, and then, there or may not be questioning. And, with that, though, I understand that Mr. James Berry, Berrien County Prosecutor is here, and also the honorable Angela Passel are here to welcome us. And so, we will be glad to hear from you.

JAMES CHERRY: Chief Justice Weaver. Justices of the Supreme Court, Clerk of the Court, Carbon Davis, Judges of the Berrien County trial court, State Bar President Albert M. Butzbaugh, and ladies and gentlemen.

On February 1, 1998 the Michigan Supreme Court adopted an administrative order indicating that at least three times per year the Supreme Court

will conduct public administrative hearings or rules or administrative orders significantly affecting the delivery of justice to and for the people of the state of Michigan.

The objectives of this policy, an informed public and an accountable judicial branch, is manifested today by the appearance of the Michigan Supreme Court in Berrien County.

The agenda before the Court today includes proposed amendments to rules and canons of judicial ethics dealing with minimum continuing legal education for lawyers, certification of attorneys as specialists within the fields of practice, the elimination of the reference to the lawyers Political Action Committee in the State Bar dues notice, political activity, and conduct of judges and candidates for judicial office, changes in the court rule concerning alternative dispute resolution, and, proposed repeal of rule 7.305(b) of the Michigan court rules concerning certification of questions to the Supreme Court.

It is my honor to introduce to you the members of the Michigan Supreme Court; Chief Justice Elizabeth A. Weaver of Glen Arbor on the shores of beautiful Lake Michigan, Justice Marilyn Kelly of Bloomfield Hills, Justice Clifford Taylor of East Lansing, Justice Maura D. Corrigan of Grosse Pointe Park, Justice Robert P. Young, also of Grosse Point Park, and finally, the Court's newest member, Justice Steven J. Markman of Mason Michigan.

On behalf of the people of Berrien County, its 11 trial court judges and the elected officials, welcome to Berrien County and our part of the shores of beautiful Lake Michigan.

CHIEF JUSTICE WEAVER: Mr. Cherry, thank you so much. We appreciate it. Let me also say that we will not that one of our brethren was not able to be with us today, and that's Justice Michael Cavenaugh, and he greatly regrets it. But I can assure you he has a very good reason why he can't be here. But he is okay.Judge Pasula?

JUDGE PASULA: May it please the Court, good morning. I'm Angela Pasula, president of the Berrien County Bar Association. And on behalf of the Bar Association, I would like to welcome all of the Justices to our County. We are honored and privileged that you have chosen our community in which to hold this public hearing, and we very much look forward to sharing a lunch with you after your morning session has recessed. Thank you.

Item 198-34 Rule 17

CHIEF JUSTICE WEAVER: Thank you Judge Pasula. With that nice warm welcome, which we really appreciate, we will start with our agenda, and I will say that we will take the agenda items now.

Some of our agenda items may not have anyone commenting, but we will go through those, and then after we have gone through those, we will go to those who have let us know that they would like to comment and address us on other administrative items that are not on the agenda.

Obviously, we will not be taking any comments on the case work; this is administrative.

Okay. With that, item number one, which is 98-34, proposed amendment to rule 17 of the Rules of the State Bar of Michigan, dealing with adoption of the minimum continuing legal education implementation rules.

Do we have anyone here to address that?
(No response.)

Item 295-20 Rule 18

CHIEF JUSTICE WEAVER: All right, if not, we will move to item number two.

95-20, proposed State Bar Rule 18, that's lawyer certification plan. Do we have anyone here to address that?

At this time I see that we have some young people entering the room and I would like to welcome them. I understand this is a high school class from St. Joseph High. Is that right? Or what school is it? Okay. Good. We are glad to have you.

And, at some point when it's all done, if we have time, we'll be open to questions from the students. And we're very glad that you're here. Thank you for coming.

Item 399-13 PAC

CHIEF JUSTICE WEAVER: Okay. We'll pass on to item number three, 99-13. That's whether to eliminate the reference to law PAC from the State Bar dues notice.

AUDIENCE MEMBER: It's very difficult to hear back here.

CHIEF JUSTICE WEAVER: Is it? The mike doesn't move. Let's see. Thank you, Ms. Gillespie.

Does this help? All right. It may be a little awkward. Tell me, again, like I used to tell my first graders, if you can't hear me, raise your hand. And I see Gloria already knew that.

Good. Now, does this help?

AUDIENCE MEMBER: Better.

CHIEF JUSTICE WEAVER: Oh, there's no P.A. If you can't hear me, any of you, raise your hand in the back, or any of us at any time.

All right, the next matter then, we're on -- did we have anyone to speak on item three, which is the law PAC issue.

(No response.)

Item 4 Canons 7 and 8

CHIEF JUSTICE WEAVER: Item number four. This is the proposed amendment of Canons 7 and 8; Seven, and adoption of new Canon 8 of the Michigan code of Michigan Judicial Conduct.

And I do have people listed here to speak. The first is the Honorable John Hammond. Judge Hammond, would you like to come forward?

And as you recall, our rules are three minutes without questioning, and then any question there may be. That way we'll be able to have everyone have an opportunity to speak. Judge Hammond.

HON. JOHN HAMMOND: May it please the Court, my name is

John Hammond, I am a member of the Bar of this Court. I am presently serving as one of the Circuit Judges in this County.

With the idea that it is better to light a candle than curse the darkness, I made an effort to draft some proposals with regard to revision of Canon 7. I ignored Canon 8. I don't know if you have copies of the current draft. I think they are coming.

I'd like to suggest, if I could, in the brief time that you have available, to pretty much work from the back to the front.

On the third page, paragraph C(2), I discovered that the rules now provide that you just can't accept any gifts. Well that sounds perfectly reasonable, except that I found that in my annual report to State Court Administrators Office, I had to list a check that I got from my mother -- because at age 96 it was difficult for her to shop -- of $100 to buy a Christmas present.

Now, really. Since I could not hear a case involving her as a party or counsel, obviously, why do we need to worry about gifts of that sort for people who are within the limits of 2.003, as to whom we would be disqualified, it seems that proscribing gifts, even from husband to wife or vice versa, is a little ridiculous.

Dropping to the bottom of the page, the concern about campaign spending basically is a concern that if you lay a little too much money on a judge in the course of the campaign, the judge might feel unconsciously, perhaps, a desire to reciprocate in some fashion.

The idea here is that by putting it in the disqualification section, that, rather than some other strained approaches, we could accomplish the desired result of eliminating that, which some might see, as an attempt to buy favor. And, if you can prevent a problem, it's better than trying to cure it after the fact.

Going to page 2, and working pretty much from bottom up. Even though this is a conservative area -- and as a matter of fact, it's said in Berrien County a true conservative is one who stands to sing "God Save the Queen".

Nevertheless, we recognize that in some areas the definition of household goes beyond that which might formerly have been thought proper, and so to say limiting gifts for the candidate's family -- sometimes family has a

different meaning. I suggest adding "or member of the household of the Judge" to eliminate some problems that I'm sure you're well aware of elsewhere.

Moving up to the next one; a firm and fixed starting date for campaign contribution solicitations is to the good of all, because right now, if you don't know when the convention is going to be, you don't know when you can start raising money.

And considering the obscene costs that you people have to endure to run for office, it would be at least nice to know when your starting date is.

The next paragraph up --

UNIDENTIFIED VOICE: Four minutes.

HON. JOHN HAMMOND: No time?

CHIEF JUSTICE WEAVER: You can finish your statement, Judge.

HON. JOHN HAMMOND: Well, time does run -- I think the rest of the items that I have in the bold face are clear enough and need no further comment. They are perfectly understandable.

I would be glad to answer any questions if you have any.

CHIEF JUSTICE WEAVER: Thank you, Judge. We will review your entire submission to us.

Any questions, Justices?

HON. JOHN HAMMOND: If I could add one thing. I'm a member of the State Bar Committee on Judicial and Professional Ethics. I do not speak on behalf of that committee. Though it's been reviewed by some other members of the committee, I do not claim any authorization the speak for anyone but myself.

CHIEF JUSTICE WEAVER: Thank you, Judge. We'll note that, too.

The Honorable Dennis Wiley. Judge Wiley?

HON. DENNIS WILEY: May it please the Court. Justices. First of all, Thank you for coming to Berrien County. Your very presence in our community displays the strong commitment of this Court to be accessible to all the citizens of this state; even the nether regions of the southwestern portion of Michigan. And I hope you enjoy your stay here.

I also would think that when I was in high school it would be a thrill to see the Supreme Court in action and we have some of our students from our local high school here who are experiencing that and I think it's a wonderful experience for everyone. I think everyone should have that potential.

First of all I support -- in regard to Canon 7, I support your efforts to formalize the rules regarding solicitations to lawyers. I think this clarifies the rules for all judicial candidates and their committees, and it also sets forth an appropriate disclaimer to avoid any inadvertent violations which may occur.

For example, if two members of the same committee, or supporters of the same judicial candidate were to solicit a lawyer to come to a fund raiser for whatever the amount was, they would be in technical violation because there's be two solicitations from the same committee, even though that might be inadvertent.

I think this avoids, through that disclaimer, the potential for that violation.

Secondly, I support the amendment to allow thank you notes and acknowledgements to be sent by the judicial candidate to a contributor. This complies not only with the rule of common sense, but also the rule of common courtesy.

When a person contributes to a judicial candidate whether he's a judge or a candidate for that election, most people expect that they're going to at least have some acknowledgement that they gave a contribution.

Technically, under the rules, sending any type of acknowledgement of a thank you to that person would be a violation. And I think this is simply a matter of common sense and common courtesy to all persons.

Thirdly, I also support the fixed date for candidates' committees to

commence fund raising. A date of January 1st of the election year is a very easy date for people to remember. It avoids having to worry about looking at your calendar to figure what 180 days is before the first primary date. And I think it's a very simple rule not only to comply with, but a very simple rule to enforce.

And I think simplicity in our increasingly complex legal situation is welcome and refreshing.

The fourth thing I would like to address is I do oppose the provision which allows fundraising up to 45 days after the election. Having been a candidate this past year and having assumed a rather sizeable debt that I was unable to afford through campaign contributions, I still oppose this provision.

I believe that once the election is over and the winning candidate has been elected, the potential for abuse ripens. Potential litigants who might appear before the winning candidate might feel perceived, if not actual, pressure to contribute to that winning candidate's campaign committee. I think the potential for abuse, particularly in smaller communities where you may only have one judge before whom you might appear, is great. And I think that that causes me great concern.

While personally it's nice to be able to go out and raise additional funds to meet your last minute expenses, I just think that it's a bad idea and I oppose that.

I welcome any questions that you might have.

CHIEF JUSTICE WEAVER: Thank you, Judge. Any questions?

(No response.)

THE COURT: Thank you Judge Wiley for doing that.

At this time I would like to make it clear to people who may not realize that the items that are on the agenda go on the agenda because they come to us in many ways. Because we put them on an agenda does not mean that we either approve or disapprove of them. That is why we have hearings and that is we look at them.

So they should not be construed as proposals of this court, per se, but only that they're out there to be looked at because they have come to us in a number of ways to be looked at. And they seem to be of great enough import that we should allow comment for them and to look at them.

With that in mind, we are continuing on item 4, and we have John Globenski, who is a resident here of this beautiful town, and a noted lawyer, coming forward.

JOHN GLOBENSKI: May it please the Court. I also would like to welcome you all to Southwestern Michigan.

My name is John Globenski. I'm a practicing lawyer here in Berrien County and a member of your Supreme Court Bar.

I would like to address my remarks to Canon 7 of the Code of Judicial Conduct, specifically Section B(2)C which prohibits a committee established by a judicial candidate from soliciting campaign contributions of more than $100 per lawyer.

I will suggest two reasons for making a change in the wording pertaining to limitation. The two are the reasonableness of the $100 limitation, and, the possibility that the limitation is unconstitutional in that it infringes upon the judicial candidate's right to free speech under the First Amendment.

The $100 limitation was adopted by this Court in 1974. It is my opinion that the $100 limitation was related to what the Justice, in their wisdom, was appropriate, reasonable, at the time, to prevent judicial candidates from pressuring lawyers into making larger contributions.

Addressing solely the $100 limitation; I believe that the same Justices sitting today some 25 years later would deem the appropriate and reasonable amount to be in the neighborhood of $300. Their judgement would be made on the basis of inflation and increased costs of a judicial campaign today.

Social security payments are raised, taken into account inflation. Congress has increased the salary of the President to reflect inflation that has taken place in the last two decades.

It is unreasonable to say that $100 today has the same economic

value as it had in 1974.

I have been in judicial campaigns for some 47 years, and I can tell you -- not that you do not know -- that the cost of these campaigns is well over what it was in 1974 and before. It costs money to send a judicial candidates message to the voters.

Without access to news media, radio and TV, the judicial candidate cannot inform the public of his or her experience, ability and point of view, all of which are necessary for the voter to make an intelligent decision.

It is my opinion that the $300 limitation per lawyer today would have the same effect intended by this Court when the $100 limitation was placed in place in 1974.

The second point I wish to address is whether the limitation, regardless of its reasonableness of amount, or of the purpose of its intent, infringes upon the judicial candidate's First Amendment rights.

I'm not a constitution lawyer, but I feel a good argument could be made that the judicial candidate's right to free speech is impaired because the limitation impairs the candidate's ability to raise funds to effectively convey to the voters, by the way of the various medias, his experience, his ability and his point of view.

It is my opinion that such limitation might be constitutionally suspect.

In conclusion, I hope the Court will give serious consideration to raising the limitation in Canon 7(B)2(c) to $300 and that it will consider striking the limitation completely on constitutional grounds.

Thank you for this opportunity to express these views.

CHIEF JUSTICE WEAVER: Thank you Mr.Globenski. Any questions Justices?

JUSTICE: Can I ask one question, Counsel?

Mr. GLOBENSKI: Yes.

JUSTICE: I appreciated your remarks very much. I'm wondering if you think it might be better if there were an inflation adjustment in the rule rather than just stating a certain amount? In other words, as long as these Canons exist, then there will be a problem, let's say, 20 years from now that the $300 amount is impractical.

Mr. GLOBENSKI: I think that's an excellent idea, Ms. Justice.

CHIEF JUSTICE WEAVER: Thank you so much. The Honorable Paul Maloney. Judge Maloney.

HON. PAUL MALONEY: Good morning. Chief Justice Weaver, Association Justices of the Supreme Court, Good morning. You've been welcomed by many people, but allow me to add my personal welcome to our fair community. We really appreciate you coming down to our corner of the state.

I would like to address Canon 7; specifically A) subsection 4(a). And this is in regard to the provision which would require judicial groups, or groups that consist exclusively of judges to specifically identify the names of the endorsers of a particular candidate.

I support this proposal for a number of reasons. First, I think it's fair to the public. The public is entitled to know who the judges are behind to title of any particular organization; specifically identifying the individual judges who are a part of an endorsement of any candidate, resolves any ambiguity that might be created by the mantra of a particular title of a judicial organization.

For example, to bring it to our community, the Southwestern Michigan Judges Association. There is no such organization now as far as I know. But does that include Berrien, Cass, and Van Buren County alone, or does that also include Allegan and St. Joseph County?

The ambiguity of that title may unnecessarily bring in -- or potentially bring in by implication judges who want to have absolutely nothing to do with a particular endorsement because their endorsing another candidate, or they choose to remain neutral.

So I think it's fair to the public in terms of being a full and fair disclosure provision as well as being fair to incumbent judges who are necessarily

subsumed by a particular title, but wish to remain neutral or support another candidate.

As it relates to subsection B) of the proposal, this has to do with participating in public communications. I think the goals of this particular provision are also very laudable. However, I believe that the language of that proposal should be more narrow.

Again, I think the goals of the language contained in the printed proposal are laudable under which judges should adhere. But on the other hand, I think their, for at least part of the proposal, enforcement will be difficult if not impossible. And I also think it provides the potential opportunity for improper use of the judicial tenure complaint process during the heat of a campaign.

Accordingly, I would suggest to the Court that you delete the language after the word "law" in the fourth line of the proposal. I think the remaining portions which talk about omitting a fact necessary to make a statement, et cetera, necessarily involve what has been generally described as political questions, which, frankly, I don't think are necessarily appropriate for the judicial tenure process which would of course be the enforcement mechanism here.

And I also think that it also has the potential of improper use of the judicial tenure process during the course of a campaign; the process being used as a sword during the heat of a campaign.

I think if you narrow the proposal to deal with affirmative representations in a particular political communication, the rule will be more enforceable and also would limit the potential misuse of the judicial tenure process.

As far as the increased limit to $300 contributions, I think that is a very good proposal. As Mr. Reilly's letter to the Court points out, $100 now translates into more than $300. And I think the $100 limit artificially stifles lawyer participation in the judicial election process.

Lawyers are the most knowledgeable group in the state, I would argue, regarding the qualifications of judicial candidates. I think their participation at the $100 level artificially stifles their ability to effectuate support for a candidate that that particular lawyer supports.

JUSTICE KELLY: Let me interrupt you and ask you a question, since your three minutes are up.

HON. PAUL MALONEY: I'm sorry.

JUSTICE KELLY: The rule as it presently exists is that a lawyer can't be solicited for more than $100, correct?

HON. PAUL MALONEY: For more than $100, that's correct.

JUSTICE KELLY: But the lawyer can contribute whatever amount the lawyer might like.

HON. PAUL MALONEY: That's true.

JUSTICE KELLY: So in what way does the current rule inhibit contributions from lawyers to judicial candidates?

HON. PAUL MALONEY: Well, I think effectively, Justice Kelly, it very -- as a candidate whose run two contested judicial elections, I think effectively the solicitation rule of $100 -- it doesn't directly implicate the ability to give $500, but effectively, it does so, because lawyers are reluctant, I think, to exceed the $100 limit that is presently in the Rule, I think.

So effectively, by implication, it does limit their ability to participate even thought they may have the legal right to participate more fully. I think the notion of extending it to $300 is also more viable in terms of the cost of campaigns.

CHIEF JUSTICE WEAVER: Judge, in your campaigns, did you run into the situation of where you have supporters who want to have a fund raiser for you, and it's not just for lawyers, and they want to send an invitation where they are going to want to have $200, or $150 dollars contribution to come -- maybe $250 or $300, but they don't necessarily know who's a lawyer and who is not on their list.

And so it's very difficult to do that because of the fact that they might send a solicitation to a lawyer unknowingly for $150 and then they would be violating the ethics. That's a problem that has been expressed to me. Have you run into that as a problem?

HON. PAUL MALONEY: Oh, absolutely. You get lists of particular groups who you know are -- who have traditionally been contributors to campaigns, they contain lawyers because a lawyer is a member of that organization and that definitely does occur.

I think that the disclaimer portion of the proposed rule does have some salutary purposes there and I think that would potentially solve the problem.

But that is a problem, there's no question about it.

CHIEF JUSTICE WEAVER: Anything else? Any further questions?

Thank you Judge. Now, that is item 4, 99-32 Canons 7 and 8.

Do we have anyone else who wish to address that?

I see that our very notable Chief Judge of the Court of Appeals, Chief Judge Bandstra is here and raising his hand. So I'd invite him to come forward.

HON. RICHARD BANDSTRA: Thank you Chief Justice and other members of the Supreme Court. I look up here and I'm absolutely astounded that our court has survived. Because by my count we have about 900 IQ points of talent on this Bench that used to be on my Bench.

(Laughter)

HON. RICHARD BANDSTRA: So, I'm pleased to have worked with all but five of you, and to presently work with all but one of you with the five others.

And I, of course, worked very closely with Justice Weaver on a lot of issues as Chief Judge in my court.

I, too, want to join with everyone in welcoming you and thanking you for giving me a very good excuse to drive down from Grand Rapids today. Welcome to the Fourth District of the Michigan Court of Appeals.

A lot of what I wanted to say has been said by others so I'll briefly

address Canon 7 and Canon 8, the proposed changes that are under consideration.

To begin with, I believe generally that, with one exception, the proposed changes address real problems which should be addressed, considered.

With that general statement I'll limit my remarks to a few of the more controversial proposals.

With respect to new subsection 4 of Canon 7 a), this deals with problems that I think arose last campaign cycle when judges formed associations and then those associations took positions regarding candidates for judicial office.

I join with Judge Maloney in supporting the changes here because I think some real abuses occurred last campaign cycle.

The worst problem resulting from this kind of campaign activity -- judges forming associations -- arises out of the fact that it is impossible for the general public to clearly understand which judges the association speaks for when it takes a position.

I heard stories from last year from judges who felt that their positions as to candidates were misrepresented by associations that they were perhaps only nominally members of.

Section 4 a) of the proposed new language would address this problem by requiring that an association list the name and title of each member of the association when it makes an endorsement.

I think that goes part of the way toward solving the problem but perhaps could be improved by having the proposed listing of judges be specific to the endorsement which is being made by the association.

If it's done that way the general electorate cannot be misled. They will understand exactly who is taking the position advanced and be able to weigh the information properly as they go to the polls.

Judge Maloney mentioned a Southwest Michigan Judges Association, and as a person who runs in a large district I have concerns that associations like that, very nebulous, might formed and speak to the electorate in behalf, or in opposition to a judicial candidate.

I think that kind of activity is especially problematic -- boy, three minutes goes fast -- but I'll quickly wrap up.

I think it's especially problematic in large districts like the ones that you folks run in and I do. In smaller trial court districts perhaps judges are better known and endorsements by associations would not have as much impact.

I think there's increased collegiality amongst judges in a small area. The local press is more involved. And I think any confusion might be mitigated as a result. But for our large districts I think this can be and was a huge problem last campaign cycle.

JUSTICE: Chief Judge Bandstra, could I ask you a question, and this would be primarily for the benefit of the students in the audience.

Do you think that this Court, in the exercise of its powers should totally restrict the creation of associations of judges who do endorsing? Or do you see if we did something like that that it might run up against the Judges' rights of free association under the First Amendment to our Constitution?

HON. RICHARD BANDSTRA: Your first question is a policy question and the second one is a law question.

I think on the policy question, I don't see any problem with judges forming an association to support a candidate. A number of judges might want to pool their resources to buy a newspaper ad, which would not be effective if each of them bought their own small little ad, for example.

But I think the important thing is for the people who read the ad to know exactly who it is that is taking the position in advance so they can weigh it properly.

As far as the political association question and whether there would be a constitutional problem with that, I think the students and everyone should know that we judges are already what's often called second-class citizens when it comes to the rights that most people have.

We, for example, cannot support partisan candidates. I can't support my good friend Vern Ehlers, who goes to church with me, my

congressman, publicly, and I could do that before I became a judge. So by taking this office we do volunteer to accept certain restrictions.

I haven't researched your specific question, but I think that there could well be a rule of law which would allow limitations on our activity which could not be visited upon the general public be in a sense we do volunteer for those limitations when we take this office.

CHIEF JUSTICE WEAVER: Is your point, Judge Bandstra, then, that if we were to have a Southwestern Michigan Judges Association that you would want to see in the ad the members - -the membership of that group because Southwestern Michigan Judges Association could, perhaps, consist of -- although maybe potentially could have 100 members, depending on how far you went -- that it might only have two members.

And the public would have the right to know that the entire membership is listed there so, if it said Southwestern Michigan with two members, they might wonder just what that is. And also, they may want to see whether those people are actually from Southwest Michigan, or whether they're from the UP, as the Southwest Michigan Judges Association. Right? Not that they have anything against the UP, but they would like to know about it.

Is that your point?

HON. RICHARD BANDSTRA: That's exactly right. A group name, an association name can get very nebulous and vague. I think that last campaign cycle we saw the Northern Michigan Trial Judges Association. My understanding of that was that it was not all trial judges in Northern Michigan, and that Northern Michigan was somehow broadly understood by this association to include places like Muskegon, which is surprising.

CHIEF JUSTICE WEAVER: Well, as a matter of fact, there were no trial judges that belonged. There were no probate or district judges, only circuit judges and it was not all Northern Michigan judges. And, they came down as far as Saginaw and lower in Michigan, which is interesting to Northern Michigan to find out those places are in Northern Michigan.

But the public did not know. Is that your point?

HON. RICHARD BANDSTRA: Yeah. I think that's an excellent

illustration of the kind of confusion that can result. The proposed changes I think are simply a disclosure to the public and I find it difficult to argue against that.

I will stop there.

CHIEF JUSTICE WEAVER: Good, because your time's up. I know the lawyers are enjoying seeing the judges have a time limit.

(Laughter)

CHIEF JUSTICE WEAVER: All right. Mr. Butzbaugh. Here is the president of the State Bar of which this county and Southwest Michigan can be proud to have the president of the State Bar here right from St. Joe, Benton Harbor, Berrien County.

So, you would like to address this issue Mr. Butzbaugh?

AL BUTZBAUGH: Yes. Just very briefly. I would like to inform the Court of the timetable which the State bar has adopted for the State Bar's recommendation to the Court as to the State Bar's position on Canons 7 and 8.

At the last public hearing -- I think it was September 16 -- this matter was before the representative assembly that afternoon. It was tabled until November 11. I believe that is a holiday. Hopefully a court holiday --

CHIEF JUSTICE WEAVER: We never stop.

AL BUTZBAUGH: -- which will free lawyers to be there because it's a Thursday. But it was chosen for that purpose. The bar has retained two counsel to -- both of whom we feel have unique talents and perspectives on this particular issue; Peter Ellsworth of Dickinson Wright, and Mike Hodge of Miller Canfield.

They are preparing, as we speak, a memorandum as to what they feel about this and they are to cover all issues. And so we have a complete airing of all the issues that they can identify.

That memorandum is due October 27 and it will be submitted to the ethics subcommittee. There have been four subcommittees established from the ethics committee which will give us initial review of the memorandum and their

position as to what their recommendations will be.

The full ethics committee is meeting November 5. With that, their report will be completed that day as well as -- and that will be submitted to all members of the representative assembly, as well as the memorandum from Ellsworth and Hodge.

Then the representative assembly will be meeting on November 11 and the report will be in your hands no later than November 12th which will be everything that we have generated up to that point.

CHIEF JUSTICE WEAVER: Well we appreciate that update. We appreciate your coming. Any questions?

JUSTICE: I'd like to say also, Mr. Butzbaugh, I think we appreciate the fact that the bar is taking this so seriously and putting the kind of time and attention into it that it deserves. It's nice of you.

AL BUTZBAUGH: Well, Thank you. We intend to do that. We're committed to do that.

JUSTICE: Look forward to hearing your counsel.

CHIEF JUSTICE WEAVER: Now. Anyone else who wants to address this item 4 Canons 7 and 8 proposals?

(No response.)

Item 5 Rule 2.401

CHIEF JUSTICE WEAVER: That being the case, there is none, we'll go to item 5 and item 5 is the proposed amendment to Rule 2.401 and et cetera, and do we have anyone here to address that? I think we do.

We will start with Vicki St. Charles.

Oh, you can't hear me again? Thank you. We're on item 5. And we have Vicki St. Charles here to address that item.

VICKI ST. CHARLES: Good morning Chief Justice Weaver and members of Michigan Supreme Court. I come to you from Ann Arbor, from a small non-profit mediation center in Ann Arbor who does mediation under the Community Dispute Resolution Program Act of 1988.

So I speak to you from an area of mediation, not particularly all of the different areas of ADR that are identified in these rules.

These proposed rules -- I stand here in support of these rules. I think that these rules are probably one of the best set of rules that I've seen come out.

I've been in the area of law for 15 years; for the last five years in the area of mediation. Prior to that in the area of litigation. I see the benefit of ADR in many areas.

The task force that proposed these rules to you had specific reasons for doing so, and I think these reasons are addressed within the rules themselves.

JUSTICE: Ms. St. Charles, were you a member of the task force?

CHIEF JUSTICE WEAVER: No questions yet.

JUSTICE: Oh, I'm sorry.

CHIEF JUSTICE WEAVER: Thank you Justice.

VICKI ST. CHARLES: Specifically, I want to address one area of these which allows parties to request an ADR process, but also allows and gives the judge an authority to order parties to an ADR process.

I know that there has been some continuing discussions regarding these issues and I'd like to address those just very briefly.

I think that Rule 2.401 is an appropriate for a judge to be able to order parties to an ADR process. It's very soon in the process of litigation and, of course, we're talking about non-binding processes here.

The judge is not ordering anybody to reach a settlement or an agreement. He's simply ordering them to participate in a process that may be able

to save them time, may be able to save them money, may provide them with a more user friendly, if you will, court system. And also will assist the parties, even if they're not able to reach an agreement, to develop a wider range of potential outcomes for the dispute itself.

Also, Rule 2.410 gives parties the authority to request an ADR process of the judge. And also gives parties a means of, if they've been ordered to an ADR process, to request that they not have to participate.

I think the rules very well address, if you will, the mandatory and voluntary nature of making referrals to an ADR process. Many judges around the state already make referrals to ADR processes other than what we now -- these rules are calling case evaluation, and have done so very successfully, have been able to reduce the court docket and have allowed the parties to reach an agreement that works for them.

We all know that judges can't always do what's best for the parties. This gives the parties the opportunity what works best for them and I completely support these court rules.

CHIEF JUSTICE WEAVER: Thank you. And now, Justice Corrigan.

JUSTICE CORRIGAN: I apologize for interrupting you.

VICKI ST. CHARLES: No problem.

JUSTICE CORRIGAN: Were you a member of the ADR task force?

VICKI ST. CHARLES: No I was not.

JUSTICE: You were not. Okay, thank you.

JUSTICE: Ma'am, can I ask you just a brief question. There's been some concern expressed that ADR is costly, and for people it's not going to benefit --

For example parties -- let's take the tobacco litigation as an example. Certainly ADR is not going resolve that, or many other kinds of cases, I suppose,

could be imagined.

Is it your expectation that through the second rule you mentioned, was it 2.410?

VICKI ST. CHARLES: Yes.

JUSTICE: That, the parties could come before the judge and say "Look, we don't want to have this, and the reason is it just wouldn't do us any good."?

VICKI ST. CHARLES: Correct. It allows the parties to come before the Court and show them that it would not be beneficial in that case, that it would be costly or time consuming in that matter.

JUSTICE: And this gives the judge discretion to let them out?

VICKI ST. CHARLES: Correct. It does provide them with an out.

JUSTICE: I'm concerned about the party who doesn't have enough money to be in court in the first place, to hire a lawyer; scrapes up just enough to do that. And then he's ordered by the judge into mediation which prolongs the effort.

If it isn't successful, could very well cause this litigant to have to drop his cause merely because he can't afford to go into yet another procedure in order to have his case resolved.

VICKI ST. CHARLES: The court rules -- the proposed court rules do address that in that it says that parties that cannot afford these processes or the court process, can request that they not have to participate in the mediation process or the ADR process and that the court can waive that requirement for those people. So it does provide --

JUSTICE: And the court can refuse to waive it, too.

VICKI ST. CHARLES: I believe so, yes.

JUSTICE: Why should we invoke a process whereby a judge can

force a party into mediation when the party can't afford to go, doesn't want to go?

VICKI ST. CHARLES:

JUSTICE: And the court can refuse to waive it, too.

VICKI ST. CHARLES: I believe so, yes.

JUSTICE: Why should we invoke a process whereby a judge can force a party into mediation when the party can't afford to go, doesn't want to go?

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JUSTICE: And the court can refuse to waive it, too.

VICKI ST. CHARLES: I believe so, yes.

JUSTICE: Why should we invoke a process whereby a judge can force a party into mediation when the party can't afford to go, doesn't want to go?

VICKI ST. CHARLES: There are many mediation processes, or ADR processes, and I guess we're talking about really more than mediation. I stand from a point of mediation. Myself as the director of a community dispute resolution program, a community based center, we provide very low cost mediation services and, in fact, waive our fees for parties that cannot afford the process.

The process itself is very quick. By the time somebody contacts our center until the time they're sitting down in a mediation is usually less than two weeks.

So it is not extremely time consuming nor overly burdensome. Certainly if they chose to have their attorney a part of that process, which they do not need to have their attorney there to be a part of it, then they would have to incur those costs.

But, in fact, in mediation most attorneys do not take part of that process.

JUSTICE: I've taken part in mediation. I strongly support it. But

I support voluntary mediation. It troubles me that a situation can easily arise where on party can easily afford a lawyer, insists on bringing his lawyer in.

The other party who can't afford the lawyer doesn't have the lawyer there and then finds himself hammered and pressured and exhausted in yet another prolongation of the process.

VICKI ST. CHARLES: I'm not sure that the court rules -- and I don't believe that they do -- mandate a settlement agreement coming out of that process.

I think that any settlement or negotiation within that process remains voluntary and, again, being a non-binding process. I think it speaks to that.

But we're not asking anybody or forcing anybody to reach an agreement.

And, also, that, it has been my experience that even when people feel that they've been ordered -- and normally, they haven't been -- to participate in mediation, we make it very clear in the very beginning that they may have been ordered to come, but from that point on their participation is voluntary. And they are free to leave at any point.

JUSTICE: They're free to leave, but many people can't handle that well and knuckle under when in a position of being told that this is the way that they can settle their dispute, this is advantageous to them, and, in fact, it isn't, and they don't have a lawyer there to tell them so. They can't afford to bring a lawyer in.

Why should we mandate someone to go through that process, to even endanger that some people will fall prey to a process that can be and should be so helpful to them? Why not leave it to their choice?

VICKI ST. CHARLES: I think that perhaps within these rules it would make it -- I think that the rules, themselves, almost make it automatic for the parties to obtain information about the ADR processes and give the judge the authority to mandate inappropriate cases, but also give the judge the authority to waive that, as well.

And I think that keeping that within the judicial system along with a

code of ethics, if you will, for people that do ADR processes in the courts would be familiar who their providers were. I think that it can very well be sculptured into a very useful part of the court system.

JUSTICE: The question is why tip the scales in favor of a mandatory system? Isn't -- don't you -- you do a lot of mediation, right?

VICKI ST. CHARLES: Correct.

JUSTICE: Isn't mediation something like therapy; you really want the participants to be there of their own accord.

VICKI ST. CHARLES: Yes. Absolutely. You want them to be there --

JUSTICE: That enhances their likelihood of a successful outcome if both are motivated to be there.

So why would we then want to tip the scales in favor of a coercive presence as opposed to a cajoled presence or a voluntary presence at mediation?

VICKI ST. CHARLES: I think that from the point of the beginning of the mediation process or any other ADR process addressed in here that participation from that point needs to continue to be voluntary. It's vital to that process.

The problem is is when parties are involved in a dispute and they've already invested themselves into the court system and their positions, many times a judge can offer them ways to resolve their dispute more amicably. It may even be better for them. But they have invested themselves so strongly into their positions that they are not willing to give that process a try.

And by giving judges the ability to say "You need to give this a try. I'm not telling that you need to reach an agreement or even participate in the whole process, but I'm saying you need to give this a try and you need to go into it with an open mind."

Many people, once they're there would see the benefit of being there and would stay even though given the option at that point it continuing to be voluntary.

I think it's kind of human nature that they get so involved.

JUSTICE: Ma'am, you mentioned that many times people with lawyers come to mediation without their lawyers?

VICKI ST. CHARLES: Correct.

JUSTICE: I'm puzzled by that. Really, that's frequent?

VICKI ST. CHARLES: Yes, actually it is. Many times attorneys will be available for their clients to speak to in a separate meeting, if you will, or by phone. But --

JUSTICE: I understand how they could get in touch.

VICKI ST. CHARLES: -- they're not there to represent them.

JUSTICE: What kind of case would that be, Ma'am?

VICKI ST. CHARLES: Many different types of cases. We've had it in probate cases, small claims cases, many different types of monetary and non-monetary --

JUSTICE: Would it ever be in a divorce case?

VICKI ST. CHARLES: Yes, actually many times divorce clients, but in the mediation process --

JUSTICE: I'm talking now about cases where they have a lawyer. They say "You stay home. I'll go take care of this."

VICKI ST. CHARLES: All agreements reached in divorce mediation --

JUSTICE: Have you had a lot of that in divorce?

VICKI ST. CHARLES: -- have to be reviewed by attorneys first. Pardon me?

JUSTICE: You have a lot of divorce cases where they --

VICKI ST. CHARLES: No at our center, but --

JUSTICE: Well, generally speaking then, if you know about this. I just want to ask you. Do you have a lot of divorce cases where people have retained counsel, they come to mediate, maybe settle their case and have no lawyers there?

VICKI ST. CHARLES: Yes.

JUSTICE: How about other Circuit Court actions like employment discrimination. That happens in employment discrimination cases as well?

VICKI ST. CHARLES: In those types of cases usually the lawyer is at the table, if you will. Is there, but they don't speak on behalf of the client.

They allow the client to do the speaking on their own behalf. And then they're allowed to meet with the client separately outside the room, but generally the attorney does not speak on behalf of the client; doesn't do the negotiating.

JUSTICE: Can I ask you in a hypothetical we have about the divorce case. Who advises the client about his rights in the other spouse's pension plan?

VICKI ST. CHARLES: The attorneys. The mediators do not allow any agreement to be signed by any party that has not been reviewed by their attorney if they're represented by an attorney.

And, they make it clear throughout the process that they really need to have their attorney involved and mediators actually involve the attorneys.

JUSTICE: So you theoretically could have an agreement at the table that is uninformed by such things as the value of a pension plan?

VICKI ST. CHARLES: Hopefully, if they have an attorney they know that --

JUSTICE: Hopefully.

VICKI ST. CHARLES: -- going into the mediation. And we make that real clear that they need to know those things before they sit down to negotiate. They need to consult with their attorneys. They need to know what their rights are. They need to know what the value of their assets are.

And before they can sign any agreement, it has to be reviewed by an attorney.

JUSTICE: You know, I have a reasonably high level of extraction capability. But when it gets to pensions, I doubt that I could represent myself very well in such a negotiation.

VICKI ST. CHARLES: See, our center doesn't handle those types of things for that type of matter --

JUSTICE: Well, Ma'am, we're not talking about you.

VICKI ST. CHARLES: -- for that reason.

JUSTICE: We're talking about the kind of case -- I mean, you're here sort of representative of a class, I guess. That is, people who are in favor of this process.

So I guess we're maybe asking you questions you might not be experientially ready to answer. But these are the problems that I think you have if you look at this thing.

I mean people hire lawyers because the law is complicated. The idea that you could take your client and fully inform them of qualified domestic relations or pension distributions, how professional degrees should be evaluated, and a thousand other really difficult, for lawyers even, issues.

And march this poor disturbed soul who's going through a very traumatic time in their life into do battle with their spouse who's also unrepresented just seems to me to send people on a fool's errand.

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VICKI ST. CHARLES: And I apologize. I have not paid much attention to the divorce mediation amendments because they don't involve our center a lot.

JUSTICE: Isn't that what we're going to see most of?

VICKI ST. CHARLES: And I would have to look. I don't want to misspeak myself. But I believe that the divorce, or the domestic relations mediation rule specifically addresses that and I believe in that rule the mediators need to have a JD.

And I haven't spent a lot of time on that rule because it didn't affect our center greatly.

CHIEF JUSTICE WEAVER: And we understand that, Ms. St. Charles, and appreciate that and we do have some other people that want to speak on this issue and so maybe they will have some answers, too.

What I was saying is we have other people on this agenda and we

thank Ms. St. Charles for sharing her experiences.

Now, the next person to speak on this ADR issue is Joan Binkow.

Before you speak we'd just like to thank the students for coming, and we hope it was a worthwhile experience for them. Bye now.

Okay. Ms. Joan Binkow.

JOAN BINKOW: Good morning Chief Justice and Justices of the Supreme Court. This is a treat for me. My son's in law school and wanted to know how I got before the Supreme Court before he did.

I am addressing Michigan Court Rule 2.411, the qualifications of ADR providers.

Let me give you one or two sentences of my background. I am the president of the board of the Dispute Resolution Center of Washtenaw County and the owner of General Television Network, GTN Industries in Oak Park, one of the largest women owned businesses in the state of Michigan.

I give you that background because in 20 years I've had experiences with outstanding lawyers and business people as well as community activists, social workers, mediators, people of all different professional backgrounds.

One of the issues that I would like to address; I understand that there are some attorneys in this state who feel very strongly that mediators should be attorneys only with litigation experience.

I will tell you that there is no state in this country that limits the experience of mediators to attorneys. There is no province in Canada that does that. And this is a discussion that has been taking place in great seriousness over the past couple of years.

The American Bar Association resolved it at their Spring meeting that mediators, professional mediators, their backgrounds could be attorneys as well as non-attorneys and there were people in the audience who stood up and cheered because this was a very contentious but well thought out and reasoned conclusion that the American Bar Association had come to.

Major centers of training in dispute resolution; Harvard's program on negotiation with MIT and Tufts, Pepperdine University Law School. They train people of all backgrounds to be qualified mediators.

I'd like to list for you a few of the mediators our center works with. Guadelupe Lara, Children's Hospital in Detroit. Her expertise as a social work enables her to mediate cases of diversity.

Rosalee Rishavee, EEOC. Ed Hartfield, he's lived in the Orient, his background is a business consultant. He speaks Japanese and Chinese and he negotiates mediations. He mediates between Michigan corporations and those in the Far East.

Bernie O'Connor, professor, assistant dean at Eastern Michigan University, Catholic priest, mediates complex ecclesiastical mediation and his background and understanding as a mediator.

Bob Gelardi, principal of Pioneer High School in Ann Arbor mediates family cases, incorrigibility cases, abuse and neglect cases.

Our center, and the 25 other centers, Dispute Resolution Program Centers in this state train mediators. They train them -- family independence agency workers. We train police and sheriff. We train social workers and teachers so that they have the tools to hear those places in the community where they can resolve conflict, conflict, the consequences, the sources, the solutions. They're not always in the law. They are between the people.

And it is essential that lawyers and non-lawyers have the kind of mediating skills that are provided for in the proposal that has come before you. That without proper mediation training and continuing training, lawyers will begin to confuse what is a negotiation or a settlement agreement conference with a real true mediation process.

And mediators must have the kind of qualifications that are stringent in this proposal.

I, and our center and the centers under the State Court Administrative Office are very much in favor of these thoughtful proposals that are before you.

Yes?

JUSTICE: Ma'am, first of all, tell your son you set a very high standard.

CHIEF JUSTICE WEAVER: Excuse mea minute Justice. Has she finished with her time?

Okay, so we're free to question. Go on.

JOAN BINKOW: Or I'd be able to keep talking for a long time. I'm so passionate about this. yes?

CHIEF JUSTICE WEAVER: You're out of time. Now we have questions.

JUSTICE: I guess I was interested in the iteration of different specialties that mediators have.

Is there anything -- I couldn't remember whether the rule requires that a person, a mediator with a particular area of specialty is limited to that are of specialty.

For example, your ecclesiastical mediator. Would that person then under this rule be permitted to become involved in any kind of dispute?

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JOAN BINKOW: Under this rule, yes. But it's interesting. My familiarity -- I've only been in this field for a few years. I can tell you about Washtenaw County and about the Dispute Resolution Centers.

The Dispute Resolution Centers, with basic mediator training, which is the 40 hours and observations -- not only observing other mediate, but having them observed. In those centers we are only able to provide general, civil case mediation, small claims mediation. Any other kind of mediations; divorce mediations, family mediations, abuse and neglect cases, landlord/tenant trainings, we have specialized trainings, most of which are designed by the State, some of which are -- we have to seek out of, provide ourselves, and have specialized trainings.

So we have absolute requirements that people have specialized training in specialized areas.

The Family Court system in Ann Arbor requires, after basic mediation training, specific divorce mediation training. The list of providers only

is those mediators who've had specialized training.

Now, many people are able because mediation is a process. You don't really have to know the subject matter with which you're dealing if you know the process well and are articulate enough to be able to reframe people's issues.

I would not be dealing with complex engineering cases, but I could handle many different kinds of corporate issues both financial and corporate.

So your question, is it required according to these? No, but the referral sources should know their provider list and have knowledge that if they want specialized training it should be there.

But fine mediators are able to move within certain ranges between different fields because it's a process, because the mediator, as you all know, does not act as the judge, does not offer opinions.

So it's being able to listen carefully and reframe issues so that the parties, themselves, can come to their own conclusions.

When I was in business and my engineering people and my marketing people, I didn't know the answer either way so you guys have to figure it out, you have to come to a conclusion. I don't have those answers. I don't have to be an engineer to be able to do that, or a marketing person, thank goodness.

CHIEF JUSTICE WEAVER: Any further questions? Yes.

JUSTICE: You know, judges are, particularly in metropolitan areas of the state like Washtenaw County, are under pressure to handle a large load of cases. And the result is sometimes that judges will find a way to move the cases as quickly as possible through their system so as to show good statistics.

And although I know most of them try very hard to do a conscientious job, occasionally a judge will simply use a way out to move the cases quickly even when it's not in the best interest of the litigants.

Now if we had a number of judges in the state who proceeded as a result of these new rules to send all their cases, all their civil cases, to mediation,

would we have enough mediators to handle those cases who are qualified to handle them?

JOAN BINKOW: No. But I think that --

JUSTICE: Would that not lead people to greater frustration with the system?

JOAN BINKOW: I don't think that it's going to happen because I think that the process of educating the judges as to what mediation is, the process of intake, meaning when, even if the judge sends ten cases during the explanation of what mediation is, many people say "I'm not interested. I really want to fight. I don't want to come to the table."

I think this is a field that's going to grow. This is a brand new field. It's only 10 or 15 years old. And in our state we are way behind other states in the number of judges, lawyers, corporations, individuals who even know what mediation is.

So I think that there is going to be a ramp up time -- I was thrilled to see the amount of training and education that's required by these proposals because there isn't enough. There isn't enough knowledge on which cases are appropriately sent to mediation and which individuals get the knowledge of how do we handle this?

But I don't see it as a problem because in our county a few judges are believers in mediation and they are sending them to mediation, they are sending cases to our center.

Most of the lawyer mediators in our town are saying "We don't get enough cases. We are on the list and we almost never get referrals."

So I think it's going to be a learning process that the number of mediators and the education and the amount of referrals will begin to grow commensurately.

JUSTICE: Perhaps we should wait to mandate mediation, mediation such that people can't opt out once they know what the process is. Perhaps we should wait until we do have enough mediators to accommodate the flood of cases that could come in as a result of a mandated rule.

JOAN BINKOW: I will tell you the experience in Washtenaw County and when you say mandate mediation, because -- and you all discussed this already -- because it's a voluntary process, even during the intake when it is being discussed -- this is what mediation is, this is the process, it's neutral, it's a third party, you and the opposing parties -- you know, all of the explanation of the process.

At that point it has gone to mediation. And I'm not sure what this rules says. I didn't address that point of it in terms of mandating.

But in Washtenaw County now, they mandate all divorce cases to mediation. All that party has to do is call up, find out about mediation. And if they say "No, it's not for me.", that part of the mandate has been fulfilled.

JUSTICE: Is that the way our rule then should read? Should we amend our proposed rule to read to accomplish what you've described?

JOAN BINKOW: In Washtenaw County parties have to go and find out about it and the lawyers have a training I think once every two weeks. I'm not sure what it is.

JUSTICE: My question is should we change the rule that's now before us?

JOAN BINKOW: I'm not sure because I don't the other part of -- I don't know, you know -- I'm not an expert in that. I don't know.

I can only tell you from my limited point of view.

JUSTICE: Or perhaps we should launch an experiment and see how it works if we have some demonstration districts that are voluntary in the -- totally voluntary, and some that are mandatory and see just what results we get out of it, like pilots.

JOAN BINKOW: I think if it's totally voluntary you won't have the opportunity to grow judges into learning. The ones who don't use it and aren't familiar with it and haven't had some success may not use it.

And so I think in some way this movement toward, try it out, just try

it.

Now what the words are and how mandatory mandatory is, I don't know.

CHIEF JUSTICE WEAVER: Justice Corrigan then is proposing maybe some pilots and demonstration projects where we would have it mandatory and maybe some where -- when obviously we have some going on, because it's not mandatory right now, anyway. And then see.

Just from your own experience, you're Washtenaw County, right?

JOAN BINKOW: Yes.

CHIEF JUSTICE WEAVER: Have you found any abuse by the judges that are --

JOAN BINKOW: None.

CHIEF JUSTICE WEAVER: So, and, wouldn't you not think if it were mandatory -- yes?

JOAN BINKOW: I have an enormous respect for the judges in Washtenaw County and if they think it's appropriate because of experiences they've had, they send it to us. But they don't --

When we first reopened this center it had -- there were a lot of funding --

CHIEF JUSTICE WEAVER: So your idea of mandatory is it might expose it to judges that maybe don't know a lot about it. Is that right?

JOAN BINKOW: Absolutely. And haven't tried it. And those judges that have tried it, they do not want their clients to have bad experiences.

CHIEF JUSTICE WEAVER: And we're not -- if you, in your position saw abuses by the judges, assuming that there may be an abusive judge -- we've got 600 judges in Michigan and all of them are really fine, fine, people as far as I know, but occasionally when someone slips through, then we do have the provision of the judicial tenure commission, don't we?

If a judge was dumping, is what I think Justice Kelly is seeming to be worrying about, that, wouldn't it be appropriate for them to be sent to the judicial tenure commission if a complaint would be made, perhaps?

JOAN BINKOW: That would not be something that we would do. Our relationship is with Bob Brandoff and with Kent Betty, the court administrators in Washtenaw County who were the ones who opened the doors and said "This is how we think you should have training for the judges." Which we did. And I think that would be a very useful part --

CHIEF JUSTICE WEAVER: But if you observed a dumping judge, is what we'll call them, you would report it to the court administrator?

JOAN BINKOW: We, on a regular basis, speak to the court administrator to say "These are the kinds of cases that are coming in. Is there anything more we can do to help you? What's working? What's not working?"

I don't see that as a punitive process. I see that as a real -- our communications are outstanding.

CHIEF JUSTICE WEAVER: But thus far you haven't seen any dumping in your experience?

JOAN BINKOW: Not -- on the contrary. We would -

JUSTICE: But you don't really have mandatory mediation.

JOAN BINKOW: We do in family mediation and divorce.

JUSTICE: You simply have mandatory information about mediation.

JOAN BINKOW: Correct. That's correct.

CHIEF JUSTICE WEAVER: You've been very helpful. Any further questions?

JOAN BINKOW: Thank you very much. I appreciate your time.

JUSTICE: Thanks for driving over this morning.

CHIEF JUSTICE WEAVER: Again, Thank you. We have another person, Debra -- and excuse me, I'm going to try it -- Barrich?

DEBRA BERRICE: Much closer than some. Debra Berrice. And I'm an attorney and mediator here in Berrien County and I'd like to add my welcome to you to our beautiful County.

I will direct my comments to proposed Court Rule 3.216 dealing with domestic relations mediation. I have previously written the Court expressing my support of the proposed amendments dealing with alternative dispute resolution, but this morning I'd like to specifically address the training requirements under the proposed Rule.

The training required under the proposed Rule addresses, among other things, mediation and conflict management. It also addresses relationship skills and knowledge, and communication skills and knowledge.

I've heard it suggested that and attorney practicing for 25 or 30 years shouldn't have to go through training to become a mediation. And I would submit that the longer one has practiced law, perhaps the more needed that training is.

I've been a trained mediator since 1995. I've mediated well over 350 hours of family cases. I also continue to litigate cases. And I can tell you I believe that litigating a case is far less challenging than developing the skills it takes to successfully and neutrally mediate a family case, to manage the immersions that present themselves in the mediation session and guide parties toward a thoughtful agreement.

The Academy of Family Mediators requires that its members receive 30 to 40 hours of family mediation training. And I will concede that some of the training dealing for example with property issues may be superfluous for an experienced family law attorney.

However, the bulk of the training covers much more difficult issues. I went through a couple of training manuals last night and pulled out some of the topics.

Just a brief list; how to actively listen and what that means; maintaining neutrality, key to the mediation process and it's integrity; providing

reality checks for the parties; handling power and balances between the parties -- and there was a question about parties being coerced into the process -- screening for spousal abuse and how to appropriately and effectively do that; developing creative parenting plans that meet the parents and children's needs; and, maybe most importantly, dealing with the emotional issues that can block settlement.

Many of these skills are foreign to attorneys more used to operating in an adversarial environment and they often become alien the longer one has practiced. I think that the problem stems from a basic misunderstanding about the role of the mediator on the part of those who suggest that merely practicing family law for an extended period of time qualifies one to be a mediator.

Many people still do not understand that the mediator is neutral. And rather than guiding the parties toward a settlement that the mediator finds reasonable, the mediator helps the parties identify and develop a settlement that they find reasonable and workable for them.

Ultimately, since they are the ones that live with it, that's the only kind of settlement that really makes sense.

I'm pleased that parties going through a divorce in Michigan will be more likely to have the opportunity to mediate the divorce if the proposed rule is adopted.

And I'm hopeful that the reasonable training required under the proposed Rule will remain intact so that these parties receive quality mediation.

Thank you.

CHIEF JUSTICE WEAVER: Thank you. Any questions Justices?

JUSTICE: Ma'am, are you in favor of mandating mediation even if one of the parties is adamantly opposed?

DEBRA BERRICE: It depends on what you mean by mandating. I am in favor --

JUSTICE: Requiring.

DEBRA BERRICE: I am in favor of -- and this is what we do in Berrien County currently under the pilot project. I am in favor of mandating an exposure to the option; learning what the --

JUSTICE: This would be a session where people would learn what mediation is?

DEBRA BERRICE: Right.

JUSTICE: Okay. Let's assume they go through it and they say "I don't like it."

Would you then make them go through mediation?

DEBRA BERRICE: No. I think that's a farce to assume that you can force people to settle. You can't.

JUSTICE: Is that what the rule says?

DEBRA BERRICE: It says that a judge may order -- may submit to mediation any contested issue in a domestic relations case.

And, frankly, most well-trained mediators would understand that distinction between explaining the process and require -- how would you do that? You know.

JUSTICE: Doesn't that, as written, then give them the right, even if you aren't interested in it, to force you into it?

DEBRA BERRICE: I'm sorry?

JUSTICE: Doesn't that rule, as you read it, indicate that even if you're not interested in mediation, the judge can say "Too bad. You're going there."?

JUSTICE: It's very simple how this would work. The judge would simply direct the mediator to come up with a recommendation and then faced with that the mediator would have to force the parties through a certain procedure in order to get to that point.

DEBRA BERRICE: I have a real big problem with that whole evaluative business.

JUSTICE: Then, would you think the rule should be changed?

DEBRA BERRICE: You know, I really have a great deal of respect for the process that was used to develop this rule. And, I think it's a real model for bringing together various factions and interests and experiences.

So I would -- it would be a big step to say that that should sort of be washed aside. But my favored --

JUSTICE: Well let me give you a hypothetical that comes to mind. It is not unusual in Michigan for all the members of the Circuit to develop a pattern in the way they handle, let us say, qualified domestic relations orders.

And let's say that you have a lawyer who has a view that they're not doing it right; they're not in compliance with what the appropriate law should be.

This lawyer wants to go through the trial and get it out of the way and then get it into the appellate courts. He has no expectation of winning at the trial court level. Simply wants to get it into the appellate system.

In that circumstance, let's suppose the judge is inflexible about this -- and I suspect that's what will happen over time, is that this will be a docket clearing device -- he or she sends the case into mediation over the objection. The person says "The reason I want to go to mediation, judge, is solely a legal problem. You guys aren't doing quadros right."

What, under the rule as it's currently drafted gives that individual, who wants to get it into the court of appeals, or perhaps even this court, the opportunity to avoid the thousands of dollars in expenses that are going to go on in mediation?

DEBRA BERRICE: What gives them the vehicle to pursue that objective?

JUSTICE: And shouldn't we set up a rule that makes it possible for that person in that position who just simply wants to get the law looked at by an appellate court that can address it, to not have to go through all these hoops?

DEBRA BERRICE: Well, there is an out provision that allows a party to object to mediation. And then a hearing is held --

JUSTICE: But at the end of the day, the judge who probably isn't -- who thinks they're doing quadros right isn't very sympathetic with his position. Gets to thwart that, doesn't he?

DEBRA BERRICE: well, I think perhaps the key, again, and that was really my main topic, was the education component. And perhaps we really need to include judges in that education component.

JUSTICE: But that's a different question, Ma'am. I'm asking a very focused question --

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DEBRA BERRICE: Well, I think that would help --

JUSTICE: -- that I'd like your help with, if you can.

DEBRA BERRICE: Well, I think a judge who truly understood the mediation process would understand the futility of sending that case to mediation.

JUSTICE: Do you want to rely uniformly across 600 judges that each judge will understand just what you said?

DEBRA BERRICE: I don't know most of them.

JUSTICE: Well, the issue is, is it a wise thing given what we've heard so far on today's testimony that relatively few judges understand mediation given what we know about docket pressures, given what I think I'm hearing from the professional mediators who have appeared here today, that they prefer to have people who are there voluntarily as opposed to coerced, does it make a lot of sense to give this mandatory rule life?

DEBRA BERRICE: I really appreciate the questions, and maybe what the answer is, is to further refine what it means to submit a case to mediation, and build in that the parties have fulfilled their obligation if they go and they learn about the process.

JUSTICE: So you think this needs to be modified so that the mandatory part is learning about what the process is?

DEBRA BERRICE: I would wholeheartedly support that, yes.

JUSTICE: Thank you.

CHIEF JUSTICE WEAVER: Thank you very much. Any further questions, justices?

All right. And we have one more person on this issue. That would the Honorable Linda Tolin.

HON. LINDA TOLIN: May it please the Court. Justices, I signed up to speak with you this morning concerning the proposed amendments to 2.400 et sic prior to realizing that in doing so I would be subjecting myself to cross examination.
(Laughter)

Also, I now realize I'm going to incriminate myself as well when I tell you about the process that we're using in the civil division of the trial court here.

But I am a trial judge here in Berrien County and since we began our trial court project three years ago, I have been the presiding judge of the civil division. So I'm not going to address the proposed Court Rule concerning domestic relations mediation, but simply civil mediation.

First of all, I would urge the Court to adopt -- I'm going to talk about the non-controversial part first -- the proposed amendment to 2.401 and 2.403, 2.400 to correct the embarrassing misnomer that we presently have in Michigan law by which in our Court Rules we refer to our Court Rule process as mediation, when, in fact, all agree, it is not mediation, it is case evaluation.

So I think at the very minimum it would well for the Court to adopt that change to correctly reflect what is already established and, gee, I believe has been established since I think it was about 1984 when that Court Rule was adopted. It was quite some time ago.

Secondly, I would like to speak in support of the proposed amendments to add the new Court Rules, 2.410 and 2.411 to expand the form of cases and the variety of Alternative Dispute Resolution that a trial court may order.

Since we began our trial court three years ago -- and here's where I'm going to incriminate myself -- we submitted as part of our pilot project widespread Alternative Dispute Resolution and we had been doing that in essentially all circuit civil cases for three years now.

I accept certain kinds of cases such a civil forfeiture and a drug action or something like that that's quasi criminal. A declaratory action, one of the justices mentioned that; Justice Taylor.

I accept that kind of case. What you -- it is purely a question of law. It's not really suitable for Alternative Dispute Resolution. But the wide variety of cases we give the parties a chance to submit their plan to us of the forum that they feel is most suitable for the kind of case they have.

It may be court rule mediation, case evaluation, that's still our number one choice. It may be non-binding arbitration, it may be binding

arbitration. It may be facilitated mediation, it may be special panel mediation, which is really case evaluation.

Or it may be some hybrid. I've had each side select one lawyer and those two lawyers select a non-lawyer specialist such as a contractor in that kind of a case, or a real estate appraiser, or, you know, some other specialist of that type to give specialized teaching and education to the two attorneys to help them come to an amicable settlement on behalf of their clients.

It has been quite successful in our county. Earlier this year we expanded it to the District court cases and Justice Kelly, in response to your questions, I think it's especially important in the smaller cases, because what I find in the smaller, let's say a smaller home repair action. The parties really can not afford to hire counsel and spend three or four days in the trial of a case where the amount in controversy is maybe only 8 or 10 or $12,000. And you know, even the winning party is not going to recoup their attorney fees.

So it's very, very beneficial if you can get the parties together before trial to resolve their dispute amicably.

Finally, if I could comment, the process that we use is a mandatory referral, not a mandatory participation. If the parties indicate to me that they want out, you know, they've explored it, and they don't feel it would be beneficial, I have never forced a party to go through it.

Lastly, we are expanding it to small claims, now through Citizens Mediation Service, our local office, and they have been very successful in successfully resolving at a satisfactory mutually agreed upon resolution, a large number of our small claims cases as well.

I'd be happy to answer any questions if you have them.

JUSTICE: Judge, is the rule as written good?

HON. LINDA TOLIN: I think it's good, Justice. What it does say is -- in the very beginning in 2.41 it says that the Court's pre-trial order shall, if appropriate, order times to initiate and so forth Alternative Dispute Resolution.

It also gives the parties the chance to select the method they feel is most appropriate, which, as I say, is what we're doing already.

It also gives them the opportunity to ask the Court to opt or, on a joint initiative, the Court may at any time issue an order for parties to participate in any non-binding ADR process.

And then it says in subparagraph 5, a party may move within 15 days after an entry of an order to a non-binding ADR process, to waive participation in the ADR process for good cause shown.

And I would just urge the Court that here I think you have to rely on the sound discretion of the trial courts as you do in other areas.

I'm sure we've all heard horror stories of judges who won't permit parties to try cases whether they have formal ADR or not, who just do not make time available for cases to be tried and consequently the parties are forced to settle a case to avoid yet another adjournment and yet another delay.

So I really view this as a benefit and something that's going to add to justice in our state rather than something that would detract from it.

CHIEF JUSTICE WEAVER: Questions, justices? (No response)

CHIEF JUSTICE WEAVER: Then, is it my understanding that here in this demonstration project here, you have been -- your mandatory part is really just to see that the parties have the benefit of the education of what it's about. Is that correct? As opposed to --

HON. LINDA TOLIN: Well, I do follow up with an order, Justice. If I have not gotten a response back within the time frame, which is 21 days -- I give them a little extra time -- but if I haven't gotten a plan selected, then I review it.

And one of the thing I review for is the amount in controversy. I am not going to order expensive facilitative mediation, for example, in a small case. But in a small case I might refer the parties to our local citizens mediation office even if they've got lawyers.

And I just did that successfully on a property dispute. They're not quite resolved, but our local CMS office was very helpful in getting them past an

impasse and they're very close to settlement on that case at this point for very few dollars.

I think the judge does have to be sensitive to the expense relative to the size of the case. And, as the other justices have mentioned, you don't want to put parties in a position where they're forced to capitulate because of money. But that's true in a trial situation, too.

CHIEF JUSTICE WEAVER: Did you have training, Judge, on mediation when you got into this or are you just a natural?

HON. LINDA TOLIN: It has been learned as I go. I did not actually participate in the formal training that many of our attorneys participated in. And, in fact, Judge Fields, who's going to be addressing you also participated in it. I did not. So I've kind of been learning as I've gone.

I've also gone to the National Judicial College's seminar on Alternative Dispute Resolution as well.

CHIEF JUSTICE WEAVER: Well regardless of the ultimate outcome of the mandatory versus non-mandatory dispute that appears to exist, would you think that it would be appropriate for there to be training, say, through our Michigan Judicial Institute for judges with respect to this issue of Alternative Dispute Resolution?

HON. LINDA TOLIN: Absolutely.

CHIEF JUSTICE WEAVER: And that would be helpful, and that's certainly something that could be done through the Michigan Judicial Institute is what you would think?

HON. LINDA TOLIN: Absolutely. In fact, I believe there have been some courses --

CHIEF JUSTICE WEAVER: And I think maybe it already has had -- but not all judges are signed up or had opportunity to because of the number of opportunities for various education they have. Is that right?

HON. LINDA TOLIN: Right.

CHIEF JUSTICE WEAVER: Any further questions?

JUSTICE: It seems to me as if, from your standpoint, and given the way you operate, there's really no need for a mandatory rule because you exercise discretion appropriately.

However, if you were sitting where we are and must be responsible for the behavior of judges throughout the state in great numbers, all of whom are not always reasonable, can you see any reason why we might not simply have a rule that allowed the parties ultimately to opt out of mediation on their volition?

HON. LINDA TOLIN: The only reason why you might not want that, I think, would be same kind of concern for not mandating it which is that the richer party may be able to force an expensive process on the poorer party by letting one party, the richer party, unilaterally cause that not to happen.

JUSTICE: So the best rule might be one that would allow one party to opt out of mediation?

HON. LINDA TOLIN: Well, I think number one, the way the proposed Court Rule is -- first of all, it's if the Court feels it's appropriate. So it isn't truly mandatory.

JUSTICE: It is truly mandatory. If the judge says "You go to mediation.", you go to mediation. That's mandatory.

HON. LINDA TOLIN: Well, once the judge orders it, you're right.

JUSTICE: That's the only part that I'm questioning you on.

HON. LINDA TOLIN: I could live with it, certainly. And if it would make the justices feel more comfortable to allow one side to, in effect, cancel out that process I certainly think that a trial judge I could live with that.

I don't share the same concerns that you do, because, you know, I'm not seeing abuses, and I have not heard of abuses.

JUSTICE: I'm pleased of that. I wish I could say the same to you. In my 17 years of practice I have seen abuses.

CHIEF JUSTICE WEAVER: Were you saying that your concern was maybe the richer party could make the less able party opt out of dispute resolution and so it would really maybe make it impossible for them to get to court.

Were you saying that?

HON. LINDA TOLIN: Yes. I mean because if the richer party then says, you know --

CHIEF JUSTICE WEAVER: I want to do it.

HON. LINDA TOLIN: -- no, I don't want to talk, we're going to trial, to an expensive trial, it may force the poorer party to lose, you know, whatever potential they had for effectuating some kind of resolution.

JUSTICE: But if the richer party has that attitude, then they're not going to be a successful mediator in mediation anyway, right? So, it wouldn't be in anybody's interest to --

HON. LINDA TOLIN: And some of our mediators would say, though, I'd think you'd be surprised at what happens during a mediation process, though, about how people's attitudes change. People who come in recalcitrant, and not receptive at all, often do change.

CHIEF JUSTICE WEAVER: Well, judge, we appreciate that. Any further questions from the justices?

JUSTICE: Thank you.

Item 6 7.305

CHIEF JUSTICE WEAVER: Thank you. Is there anyone else that wants to address this ADR issue, this item 5?

If not, we'll turn to item 6, which is the proposed repeal of Rule 7.305(b). How many on 6? None. Okay, there's no one on 6.

So now I'm going to turn to people who have come on other administrative matters they'd like to bring forth, and I'd like to recognize at this

time a former Chief Justice of the Michigan Supreme Court, Justice Thomas Brennan. And he has come from his present job here as president or whatever your title is at Cooley Law School. Certainly, founder, and other things. But I think he's the president.

He has come over here to address us and have three minutes here. So this is the Honorable Thomas Brennan.

HON. THOMAS BRENNAN: Thank you madam Chief Justice. It has been a third of a century since I drove 200 miles to make a three minute speech. (Laughter)

That was when I was a candidate for the Michigan Supreme Court, and so all of you know how that goes.

I have come here to address the Court, if I may, on a matter which I communicated to the Chief Justice back in February, but I would say that this has been a fascinating morning for me listening to the presentations that have been made and the questions asked by the member of the Court, and I'm titillated, interested and would be very happy to talk about some of these other things after my three minutes are up if some of you should ask me a question.

I wrote to the Chief Justice concerning my complaints about the language of Rule 9.207(d),(e),(f) relating to the matter of the Judicial Tenure Commission's role and function in the investigation of complaints against judges.

Specifically, the Rule says -- it didn't when I was on the Court, but about 1985 apparently the change was made. It says that the Judicial Tenure Commission my dismiss an investigation, and admonish the judge.

Specific language of the Rule which is 9.207(d) says if the preliminary examination does not disclose sufficient cause to warrant filing a complaint the Commission my dismiss the investigation, second, admonish the Respondent, or third, recommend to the Supreme Court a private censure with a statement of reasons in support of its recommendation.

Then, subsection (e) says an admonition, or order of private censure is confidential. If a judge requests a hearing on the recommendation of private censure, the Supreme Court shall remand the case to the Commission for a hearing.

And subsection (f) says on final disposition of a grievance, the Commission shall give written notice of the disposition to the complainant, and may advise the judge charged with misconduct or disability.

So, you have a situation where the Commission dismisses an investigation, admonishes the judge, a slap on the wrist, you know, "You shouldn't have done this" or "Don't do this in the future", whatever it may be. Then, sends a letter to the complaining person, whoever that may be, and says we've dismissed this with an admonition. This is what we told the judge.

So now you have got this person out there who isn't exactly a friend of the judge to start with, who is the person who has complained to the Commission about the judge, has in his or her hands the ammunition to either go to the newspapers or raise a question in a judicial campaign, and so forth, the fact that this judge has suffered an admonition at the hands of the Michigan Judicial Tenure Commission.

So, there's no confidentiality in that. Now, we're all aware of course that the Constitution which created the Judicial Tenure Commission spelled out that the Supreme Court should provide by rules for the confidentiality and privilege of these proceedings.

So it's a crack in the armor, if you will, of the system that this is allowed. And, frankly, it's been the basis for some abuse in the past.

So, I would suggest that the Court revisit the question of whether the Judicial Tenure Commission should be empowered to admonish at all.

It wasn't the original plan. The Constitution gives you the power to give a private censure. And in that case, if the judge isn't agreeable, he or she is entitled to a hearing on that matter. Whereas there's no hearing with respect to this admonition by the Commission; it's purely gratuitous and it's entirely based upon their investigation without the judge ever having had an opportunity to defend himself or herself against the charges.

JUSTICE: Can I just understand the process, though? That is what is going on, there's been outright dismissal --

HON. THOMAS BRENNAN: They're dismissing --

JUSTICE: -- plus admonition without process?

HON. THOMAS BRENNAN: That's right. We're dropping the charges against Judge So-and-so --

JUSTICE: But we warn you XYZ --

HON. THOMAS BRENNAN: We warn you, you shouldn't do this, this and this --

JUSTICE: -- without having asked for your side of it?

HON. THOMAS BRENNAN: Well, you did get a chance to write a letter. But you never got a chance to see or hear the witnesses against you, or anything like that. So you knew that there was something going on and you had a chance to write a letter to the Commissions, maybe denying what the thing of it is.

But then when they dismiss it, they can go ahead and state whatever they think about this case. And then, apparently are required, under your Rule, to inform the complainant of the disposition; not of the dismissal, but of the disposition.

Elsewhere your Rule says that the proceedings are to be confidential and that, in fact, only when the entire Commission votes, that this is a matter that needs to be aired in the public, can they disclose anything about the existence of an investigation.

And then your Rule says only that an investigation is ongoing. Or has been dismissed for insufficient evidence without telling the public what the admonition was. And yet, elsewhere in your Rule you're telling them they have to tell the complainant what the admonition was.

JUSTICE: That they have to tell, or can tell?

HON. THOMAS BRENNAN: That they must tell. Your Rule says, Madam Justice Kelly, "On final disposition of a grievance the Commission shall give written notice of the disposition to the complainant."

Not -- and it doesn't use the word dismissal. It says the disposition. And the Commission has always interpreted that to mean they tell them what the

admonition was.

JUSTICE: Is it not true that occasionally the Commission will write a letter to the judge, effectively admonishing the judge not to repeat the behavior, but not entering into an admonition, so called?

HON. THOMAS BRENNAN: Well, they could do that.

JUSTICE: And that would avoid the situation you're describing.

HON. THOMAS BRENNAN: And if that were done and not made part of the dismissal that they felt they were obliged to inform the complainant of, then I suppose that would be all right.

JUSTICE: Now have you run into -- you say this has happened in the past. And, can you give me an idea of how many instances it has happened that the Commission has admonished, privately admonished a judge and the information's been disclosed to the complainant, and the complainant has made it public?

HON. THOMAS BRENNAN: I can't -- the last link in your question I can not --

JUSTICE: Isn't that the part that's really troublesome to you?

HON. THOMAS BRENNAN: That's very troublesome to me.

JUSTICE: Has it happened at all? And if not, why are we worried about this?

HON. THOMAS BRENNAN: Well, I guess you worry a little bit about something that is clearly a possibility even if it hasn't happened.

JUSTICE: There's an awful lot we could worry about, then. We're having our hands full just worrying about what is happening.

HON. THOMAS BRENNAN: But if your Rule creates the problem, then you really ought to address it.

I know of one particular instance where this exactly did happen and

the person, the complainant, fed the information to people that were involved in the other side of a judicial campaign.

So, yes, I am aware of it having been done and having been used as a weapon in a campaign.

This particular thing that brought this to my attention this year, my answer is no, I don't think that it's been made public at this point in time.

CHIEF JUSTICE WEAVER: But isn't there an additional concern beside the complainant being able to go out to the public, which is obviously a serious matter, but, as I understand what you said -- and correct me if I'm wrong -- you said that the judge could be accused and never have an opportunity top defend him or herself at the Commission where the Commission then decides without a hearing to admonish this person and send a letter to the complainant while the judge never had an opportunity to know who accused him and what it was about and to defend themselves.

Is that what you're saying?

HON. THOMAS BRENNAN: Well that's essentially what I'm saying. The --

CHIEF JUSTICE WEAVER: And I think that's very serious in itself, much less than later on the complainant -- it's two separate issues. Justice Kelly is talking about, well, we've had instances of when the complainant has gone out and spread it around.

But I think regardless of whether they've gone out and spread it around -- you've pointed out they have, at least once you know of, and we don't know the rest -- and they could.

But it's equally of concern to me, if I'm understanding you correctly, that someone could be accused, a judge accused of some wrong doing and the Judicial Tenure Commission could take action and not give an opportunity to the judge to defend themselves and then make a judgment and send it out to the complainant.

Is that was has occurred?

HON. THOMAS BRENNAN: Exactly so. And, again to address Justice Kelly's question; even though it may never get in the newspapers, even though it may never be used in a campaign against the judge, the judge isn't too happy to have a letter from the Judicial Tenure Commission that says na, na, na, na, don't do this.

A complaint is made a judge. This judge has engaged in improper solicitation for a charitable organization, whatever. The judge says "I didn't." Writes a letter to them, says "I don't know who told you I did, but I didn't. I never did that. I never did anything violative of the canons of ethics."

And the Tenure Commission says "Well, we'll dismiss the thing, but don't do this any more. You know, don't do thus and so any more."

Now the judge has been told don't do this by the Judicial Tenure Commission, and the judge all along says "I'm not doing anything wrong. And I didn't do anything wrong. And I told them I didn't do anything wrong."

But now they're saying "You know, you may not be beating your wife, but don't do it anymore."

CHIEF JUSTICE WEAVER: But they never had any opportunity to appear before the Judicial Tenure Commission?

HON. THOMAS BRENNAN: Never had an opportunity to appear before the Commission, and if it had been a private censure by the Supreme Court being proposed, that judge would have been entitled to a hearing before you told him "Don't do it any more."

But the Judicial Tenure Commission had the power, under your Rule, to admonish the judge. And even if it never gets public, the people who -- I mean, judges are very proud of their records, they're very concerned about their performing in accordance with the standards that are expected of them. And to have something in their file that says you were a bad boy or bad girl is not going to make them very happy.

JUSTICE: President Brennan, let me just ask one follow up question. I think what you've raised here is very important. I'm wondering if you have thought about potential amendatory language that you might be willing to submit to the Court?

HON. THOMAS BRENNAN: Sure. Run a line through that whole line that says they can admonish. Forget about that. Why should they have any part of --

JUSTICE: What about the aspect of giving written notice because that violated the confidentiality aspect?

HON. THOMAS BRENNAN: Well the notice of the dismissal of the thing is all right --

JUSTICE: As long as the admonition is. That this matter -- you've asked for an investigation, we've investigated and we haven't found anything, we're dropping it.

That's perfectly all right. That's just common courtesy to inform the complainant that it's over. But not to let him in on anything else.

But, again, to get back to Justice Kelly's concern. You know, Lee Iaccoca said if you're going to criticize a person, do it verbally, or face to face. If you're going to say something nice about him, put it in writing.

And there are many, many instances in my experience in the judiciary where a presiding judge or a Chief Justice or somebody, a court administrator, sat down with a judge and said "Look, you've got to stop the drinking. You know, you've got to do, this, this, this. And if you don't, it's going to go public or something's going to happen to you that will be bad."

And there have been some wonderful stories about how those things have changed the conduct of judges and they've shaped up.

But it's done quietly and you keep your dirty laundry under wraps, and that's with whole idea of a Judicial Tenure Commission.

But to create a kind of a process that puts these things on the record in a way that this does, I think is not a good idea.

JUSTICE: Is there some intermediate step Justice Brennan, that you can think of where, let's say you've got something that really is not earthshaking that the judge has done -- it's sort of wrong, but it's not earthshaking

-- that you don't have to go through the full drill, with all that that implies to the judge in terms of judge. I mean, retaining counsel and so on?

HON. THOMAS BRENNAN: Sure. If you had the people involved in the Judicial Tenure Commission that had the respect, and they should have the respect and confidence of the bench, you get somebody that goes over to see Judge So-and-so in whatever town he lives in and sits down with him or goes out to lunch with him and said "Now look, this is what we hear and these are the things that are going on, and you know, you've got to shape up."

That's fine. And that's what should be a proactive approach by the Judicial Tenure Commission instead of that kind of adversarial thing, we're going to do it in writing and we're going to create, right off the bat, a kind of a standoff, you against us, attitude.

And that's really not, I think, what the voters intended when they adopted the Tenure Commission.

JUSTICE: Thank you.

CHIEF JUSTICE WEAVER: Any further questions, Justices?

HON. THOMAS BRENNAN: One last thing. When you consider Alternative Dispute Resolution I ask you to ask yourself one question; alternative to what?

CHIEF JUSTICE WEAVER: Thank you Justice. We'll have another hearing and you'll be welcome to come for another three minutes on ADR.

All right. Now we have a few more people. We would like to call Michael Marrs, who has asked to talk to us.

MICHAEL MARRS: Good morning, may it please the Court. I was asked to appear. I am a trial lawyer here in Berrien County. And I was asked to appear to answer any questions that the Court might have about how the project, the experiment here, has affected the practice of lawyers within a one court system.

And I am available to answer questions. I don't have a presentation, per someone, but if you have questions, I'm a trial lawyer. I'm a plaintiff's

personal injury lawyer. That's all I do.

JUSTICE: How's it working?

MICHAEL MARRS: Actually, lawyers are pretty adaptable. We pretty much conform to the rules that are placed upon us, and we survive.

And I don't mean that to be a negative connotation. I think the one trial court principal as far as the civil practice of the law -- and that's what I'm peculiarly able to address you on -- has been very successful.

I think the comments by Judge Tolin with regard to Alternative Dispute Resolution -- in fact, I think there's a general clause in our order, our pretrial order which I was fortunate to be part of the drafting is that we will entertain from the parties any sort of Alternative Dispute Resolution that they want to do, including cudgels in the parking lot if that will settle the dispute.

(Laughter)

That's -- we're adaptable. And as far as our system is concerned in terms of the civil practice, my practice, it's been actually streamlined in certain regards and I can tell you a practical application.

For example, in a wrongful death case, where we have to appoint a personal representative, we appoint the personal representative in the family division. However, as we go along and we start resolving the claims -- in particular resolving children's claims -- we don't have to return to another court system. We stay right before the same judge who has had knowledge of the case from the very beginning to the end.

It's much nicer that way, it's much easier that way because the judge certainly doesn't have to be explained to in terms of the niceties of how this case has been resolved or tried or -- and the proceeds distributed. That's one little example that I can use.

And, as far as, -- I've talked to practitioners. One of the things that I think has been problematic with our system is that in the beginning I don't think any of us realize the impact that the one trial court system -- we worried about ourselves. Lawyers always tend to think about themselves first, maybe present company excluded. But that's what we do.

And, in regard to the thing I think that we missed the boat on -- and I think everybody in this room would agree, I think we missed the boat on how it was going to affect and impact staff.

And I think in that regard I think there has been a great deal of stress. I think that perhaps in the future -- and perhaps we're a working example of that -- there should be more time spent in terms of how it's going to affect staff and how it's going impact individuals in terms of their work responsibilities.

There are people that were very specialized within the old system and are not -- and were suddenly called on to do new and interesting things of which they had no interest. And I think it created a lot of distress on the part of staff.

I think also, there's a certain amount of misdirection that's involved in an implementation of a system like this where lawyers don't know where hearings are held, don't know where the file is, things of that nature. Those are the criticisms.

I think though once -- maybe it's -- you would hope it would be faster, but in a period of years, I think that once the system gets in place I think the concept is excellent.

So that's my slant on the one trial court system.

Any other questions?

CHIEF JUSTICE WEAVER: Any questions on this? Thank you for coming.

Glory Gillespie, please. The former chair of the County Commission here.

GLORY GILLESPIE: Well, I'll make this even briefer than the three minutes, because you're late for lunch.

CHIEF JUSTICE WEAVER: No, we're not late for lunch. You take your three minutes. Or whatever you want.

GLORY GILLIESPIE: Well, as the former Chair of Berrien

County Board of Commissions and as the former Chair of the administration committee that deals with the courts, I'm very positive on the project, the demonstration project.

What I wanted to bring before you is pretty much what Mike already said. Even when you have a great idea, and the idea looks great on paper, and can work very well, it's the nitty gritty that sometimes gets in the way.

In my real life, I'm a therapist. And so listening to this mediation was very interesting. What happened here in Berrien County was that change is one of most difficult things for human beings. It's right up there with -- well, the five major stressors in life are marriage, birth, death, work, change and divorce. Interesting.

Change to do -- to make things change the way we've always done it and to move people out of their niches, including moving them from their desks may seem very trivial, but it is not. It creates a great deal of stress.

We wanted this project to work the best way it could to see if it does work or doesn't work. What we did here was to in a sense mediate. We had Saturday breakfast meeting on a couple of occasions whereby each part of the court who was affected by this, clerks to judges, sat down over food -- food is important -- and talked about what did not work.

And I was amazed to find that people were able to speak up very much as they felt in this kind of a setting. And I think things have been as well resolved over the period of time as they can be. And there is a continuing working of this.

What we have seen is that at the end of the year our pending cases our down, which we attribute to this project. Down in every aspect of all of the courts and down some 40 percent criminal court.

I feel that justice here in Berrien County is more swift than it has been in the past because court is going to take place.

I also feel that having a judge that sees a case from preliminary hearing through trial makes the judge more knowledgeable about the case and so I feel that resolution and fairness of cases is better now in Berrien County.

CHIEF JUSTICE WEAVER: And it's my understanding Berrien County wants to continue in this project. That's my understanding. Is that correct?

GLORY GILLESPIE: I certainly would like to see it continue. I can't speak for all of Berrien County.

JUSTICE: How did it result in cost savings to the county commissioners and to the tax payers?

GLORY GILLESPIE: And I am not prepared to answer that. I didn't realize it until I campaign out today you'd ask that.

CHIEF JUSTICE WEAVER: Other questions? Thank you Ms. Gillespie.

We have Jerry Frank of the FIA.

JERRY FRANK: Thank you Chief Justice Weaver and association Justices. As you know, the justice system in Berrien County is exceptionally active and busy. The Family Independence Agency, I'm privileged to be associated with for more than 31 years, has significant and extensive interaction with the judicial process in Berrien County, particularly through abuse, neglect proceedings, adoption, delinquency matters, and domestic relations issues.

Clearly, as a community and as an agency, we have certainly benefited from the unified trial court concept allowing judicial specialization permits the court to focus specifically on those critical issues to families and children. Dockets can move more quickly, and pending case loads are reduced.

Through this specialization the needs of our most troubled families and youth can be effectively addressed. Clearly, the Family Independence Agency, formerly the Department of Social Services, as you all know, has undergone major reorganization.

Welfare reform, for the better, of course, has made us better able to serve on a local basis the needs of children and families. And I think the court reunification process, or reunification process here in Berrien County has done a great deal to assist in that end and we support that 100 percent.

Thank you very much.

CHIEF JUSTICE WEAVER: Any questions of the director?

Thank you for coming. The Honorable Ronald Taylor, former Chief Judge here, and now a practicing attorney, is that correct?

HON. RONALD TAYLOR: Consultant. The inevitable bail of the retired person. I'm a consultant.

Madam Chief Justice, Thank you for entertaining some comments on matters that are not on the published agenda, and members of the Court we appreciate your being here in Berrien County today.

I'd like to address some of the comments that were made about the unified trial court. And, specifically by way of background I think some of you are aware that these courts in Berrien County have been in the business of attempting to unify for some time. As far back as 1985 the courts in this county began the process of creating cross disciplinary approaches to the administration of justice through the development of uniform procedures, interrelated information systems and cross assignment of judges between the statutory court benches.

Through the early 90's the trend continued with the development of such cross disciplinary concepts as the judicial council, which by the way, was the first in the state; the unified drug court, which was the fourth in the United States; the piloting consolidated administrative tools such as differentiated case management, central cashiering, budgeting, video technology and other concepts that were piloted in Berrien County.

These efforts at court consolidation were taken advantage of in this county by virtue of the court's inclusion in the 21st century project in 1995 and then ultimately in 1996 this Court, your Court saw fit to ask the Berrien County courts to begin the effort at total unification by appointment as a pilot project for the state of Michigan on a statewide court unification project.

That project, of course, remains ongoing today.

As some of you may recall, I was fortunate enough to have some part in those early unification efforts and was honored by the appointment by this Court as the first chief judge of the unified court.

Unfortunately, my tenure was all too brief as I was dragged out by the State Department and went into foreign work on behalf of judicial elsewhere, but I retained and have retained a major interest in the project of the unified court and have been a close observer of things as have developed in the ensuing three years.

Without going into detail regarding the statistical success of the project in Berrien County, which is, I think well known to the members of this Court, suffice it to say that to date the progress of the unified court has been remarkable.

Cases are routinely disposed of in a much more expeditious time frame. The number of cases awaiting disposition at any given time has reached an all time low.

The instance of cases reaching two years of age is virtually nonexistent. And the general consensus of court users that I speak to is that justice is being done in a very fair and consistent manner.

Now certainly all of these advances can not be solely attributed to the court unification project, and clearly there remain numerous implementation issues for future resolution, some of which have been touched on by my colleagues here this morning.

However, it is clear, I believe, that the elimination of the administrative overlap between the courts and judicial competition that's inherent in the statutory court structure has been a very positive influence on the administration of justice.

Accordingly, based on our experience to date here in Berrien County I would urge that this Court continue its efforts to advance these concepts, not only in the original pilot counties, but elsewhere in the state of Michigan.

While the unified court surely is not the total answer to increasingly overcrowded dockets and court delay, it certainly is one of the most powerful tools available to the judiciary today in combating those ongoing problems.

As we approach the millenium and the new century, the efforts at court improvement made in the last part of the 20th Century should become the

solid foundation of the court system of the 21st.

In my opinion the continued development and expansion of the unified court concept should carry the highest priority in that regard.

Thank you for your attention and for being here in Berrien County and I'll be glad to answer any questions if you have any.

CHIEF JUSTICE WEAVER: Questions? Thank you so much for taking the time to come.

And, the final speaker that I have listed is the present Chief Judge of the Berrien County trial court, that would be Honorable John Fields. Judge Fields?

HON. JOHN FIELDS: May it please the Court. Chief Justice Weaver, and Justices. It is a privilege to have you present here today and I'm appreciative to have the opportunity to share with you some thoughts and experiences with regard to the trial court demonstration project.

I'd like to thank you for allowing Berrien County to participate as a demonstration project. Your willingness to encourage demonstration courts to chart new directions has allowed the trial courts statewide to take innovative steps to enhance the effectiveness and the efficiency of the justice system for those who use trial courts.

The demonstration project courts have found that one size does not fit all. It has been extremely helpful that your administrative order creating the demonstration projects allows each unified trial court the flexibility to structure the trial court to meet the unique needs of each community.

For example, a trial court which consists of one geographical county, such as Berrien, with a single funding unit, has different needs and challenges than a multi-county trial court with several different funding units. One size, or one identical structure doesn't fit all.

And I thank you for providing the flexibility to meet out local needs while we still maintain compliance with applicable Michigan statutes and court rules.

In Berrien County working through a judicial counsel our unified trial court has established a structure of three primary divisions; a family division, a civil division, and a criminal division.

We have found that this structure ahs resulted -- has been referred to in a significant reduction in the number of pending cases in a variety of area.

And, basically, that's been -- that has occurred because we have a better use, efficient use, of our judicial resources.

In the past, if a circuit judge had two cases on the schedule, both of which were still a go, that judge might look to another circuit judge to seek coverage.

With the trial courts, we, instead of having four circuit judges, we have eleven trial court judges and we're able to draw upon any of those eleven trial court judges to cover for that second case if that's the former circuit judge may have had in now a either a civil or criminal or family division.

Although the timeliness of completion of cases is important, it is the quality of the decisions made that is the true measurement of the effective administration of justice.

In the business world and in the legal profession we are seeing increased specialization. With the flexibility to assign judges to a particular division, the trial court is able to allow judges to specialize in an individual area of the law.

With specialization, a judge increases his or her experience and expertise in a particular field enhancing the quality of their decisions.

Administratively we have sought to also work more efficiently. As an example of the benefit of the unified trial court, we have the tri-court cashiering department which oversees a centralized collection and monitoring of payments for fines, costs, restitution, child support, et cetera, in one consolidated office rather than duplication of services in the district, circuit, and probate courts as often occurs.

Although there have been many benefits, the trial court also has had many challenges. And some of those have been referred to.

It is absolutely correct to say that a major impact was the effect that the trial court changes had upon staff. We certainly sought to involve them in the planning of the trial court and to seek their input and suggestions. However, I would urge that the five months or so that we had for the planning of the trial court was not a sufficient time for planning a future trial court.

Additionally, the input of the Bar as well as others that use the court is very important when planning a trial court.

In concluding I would urge you to consider to allow additional courts across the state of Michigan to establish unified trial courts that meet the needs of their local communities.

I and others from the Berrien County trial court would be pleased to share with these courts our experiences, both the challenges and the successes. We would be pleased to work together to enhance the delivery of services and the quality of justice that is provided to the citizens throughout the state of Michigan.

Thank you again for allowing us to share our thoughts and experiences with regard to the trial court. I'd be happy to try to answer any questions that you might have.

CHIEF JUSTICE WEAVER: Any questions? Thank you for coming.

We have had everyone whose name was submitted to me who wanted to address the Court. Is there anyone here that didn't get that opportunity?

We want to express on behalf of all the justices the appreciation we have for the warm hospitality that has been given us on our visit to Southwest Michigan and to beautiful Berrien County.

And we have actually gone over our time and we do have an obligation to be at another place in order to eat, as Ms. Gillespie says, is very important.

So, with that, we are going to adjourn this session of the Michigan Supreme Court Administrative Hearing.

And again, we thank you all for coming and taking time to let us hear from you.

CERTIFICATE OF REPORTERS

(STATE OF MICHIGAN)
(SS)
(COUNTY OF INGHAM)

I hereby certify that this transcript represents the complete, true and correct rendition of the audiotape of the proceedings as recorded.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible response by any party or parties that are not discernible on the video of the proceedings.

Dated: November 8, 1999

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Michelle Toth Watkins, CER-6327